NO.: 88-1470

Supreme Court, U.S.
FILED
JAN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

UNITED STATES SUPREME COURT

1988 - 1989 Term

LOUIS THEODORE FRIGARD and
MIRIAM CLAUDIA FRIGARD,

Petitioners,

vs.

UNITED STATES OF AMERICA,
THE CENTRAL INTELLIGENCE AGENCY,
a U.S. Governmental Agency,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the United States be sued under the Federal Tort Claims Act for negligent conduct of the Central Intelligence Agency committed in the course of carrying out an Agency program where the decision to implement the program was a discretionary act?

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UNOFFICIAL CITATION OF OPINION RENDERED BELOW

Frigard v. United States of America, 88 C.D.O.S. 8366.

BASIS OF THIS COURT'S JURISDICTION TO REVIEW BY WRIT OF CERTIORARI

i) Date of Judgment sought to be reviewed: August 15, 1988.

ii) Rehearing Denied, October 7, 1988.

Rule 17.1(a) and (c) of the Rules of the Supreme Court of the United States. The Ninth Circuit's opinion is inconsistent with this Court's opinion in *Varig v. United States,* (1984) 467 U.S. 797.

Title 28 U.S.C. § 2680(a) provides that the Federal Tort Claims Act's waiver of sovereign immunity shall not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

Petitioners were private investors in Bishop, Baldwin, Rewald, Dillingham & Wong, ("BBRD&W"), an investment corporation organized under the laws of the State of Hawaii. Petitioners filed this action after BBRD&W went bankrupt, alleging that the United States, through the Central Intelligence Agency, had used BBRD&W for covert intelligence activities. The United States undertook the operation of the investment company with regard to the handling of Plaintiff's funds, and

was negligent in the supervision of the individuals involved in BBRD&W. The district Court dismissed the Complaint with prejudice, on grounds that the Complaint was barred by the discretionary function Titles 28 U.S.C. § (2680(a)) and misrepresentation exceptions Titles 28 U.S.C. § (2680(h)) to the Federal Tort Claims Act. The Ninth Circuit affirmed holding that while Petitioners could allege claims not barred by § 2680(h), § 2680(a) barred Petitioners' claims.

STATEMENT OF THE FACTS

Petitioners Louis and Miriam Frigard filed their Complaint against Defendant United States of America on April 27, 1984. In that Complaint, Petitioners alleged that the Central Intelligence Agency of the United States of America negligently participated in the operation of Bishop, Baldwin, Rewald, Dillingham & Wong, Incorporated, and that the Central Intelligence Agency's wrongful acts caused the Plaintiffs to lose approximately Three Hundred Ten Thousand Dollars ($310,000.00) which they had invested in Bishop, Baldwin, Rewald, Dillingham & Wong.

After service of the Complaint, Respondent United States of America filed a Motion To Stay the action on July 23, 1984. Respondent United States of America sought to stay this proceeding pending outcome of the criminal trial of Ronald Rewald, the former Chairman of the Board of Directors of BBRD&W, who had been indicted for mail fraud, securities fraud and other offenses based upon his alleged conduct while he was Chairman of BBRD&W. The Honorable Martin Pence issued and Order staying this action on November 9, 1984.

Petitioners filed a motion to lift the stay in this proceeding on August 20, 1985. After the matter was briefed and heard on May 20, 1986, the stay of proceedings was lifted. Respondent united States of America and the Central Intelligence Agency filed a Motion To Dismiss this action on July 18, 1986. Subsequent to the filing of that motion and prior to the filing of the Answer to

the Complaint by the Respondents, on September 25, 1986, counsel for the Plaintiffs, as a courtesy to counsel for the United States told him that an amended Complaint would be filed. Three hours after these discussions, the Defendants filed their Answer to the Complaint, effectively converting the prior Motion To Dismiss into a Motion For A Judgment On The Pleadings. Thus, Petitioners had only three days to file a Motion To Amend Their Complaint, which was necessitated by Respondent's Answer.

Respondent's motion was made on the basis of 28 U.S.C. § 2680(h), which prohibits claims against the United States arising out of misrepresentation or deceit, and 28 U.S.C. § 2680(a) the discretionary function exception. (Appendix "D"). At the hearing on September 29, 1986, before the Honorable Harold M. Fong, Plaintiffs argued that the Plaintiffs could state valid claims for relief that were not subject to the misrepresentation exception or the discretionary function exception and submitted for the Court's review a proposed First Amended Complaint.

The District Court dismissed the Frigards' Complaint with prejudice on grounds that (1) the claims based on misrepresentation and deceit were barred by the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h), and the entire suit was barred by the discretionary function exception, § 2680(a). (Appendix "B").

On January 20, 1987, the Court entered a Judgment for Defendants dismissing Plaintiffs' Complaint with prejudice. The Ninth Circuit affirmed holding that while Petitioners could allege claims not barred by the misrepresentation exception, the discretionary function exception barred Petitioners' claims. (Appendix "A").

BASIS FOR THE JURISDICTION OF THE DISTRICT COURT

This is a suit against the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 2671, and the District Court had jurisdiction pursuant to 28 U.S.C. § 1346(b).

The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1294(1), as the Judgment appealed from was final and disposed of the action as to all claims by all parties.

The District Court entered its Judgment dismissing Plaintiffs' Complaint with prejudice on January 20, 1987. Appellants filed a Notice of Appeal on March 20, 1987, which was timely under Federal Rules of Appellate Procedure 4(a)(1).

ARGUMENT

I.

THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT DOES NOT BAR ALL DAMAGES LEGALLY CAUSED BY A DISCRETIONARY ACT

Petitioners Louis Theodore Frigard and Miriam C. Frigard, Petition for Certiorari on grounds that the Ninth Circuit's August 1, 1988, published Memorandum is inconsistent with a prior ruling of this Court, in *Varig v. United States,* (1984) 467 U.S. 797 at 812. In *Varig,* this Court held it is the nature of the conduct complained of rather that the status of the actor that determines whether the discretionary function exception bars a claim under the Federal Tort Claims Act. *Varig Airlines v. United States,* (1984) 467 U.S. 797 at 812. The Ninth Circuit determined that Plaintiffs' injury was legally caused by a discretionary act (the decision to use BBRD&W in covert operations), rather than examining the conduct complained of,

(the negligent handling of Petitioner's funds and the supervision of BBRD&W's employees).

The Ninth Circuit found that Petitioners' claims arose out of the Central Intelligence Agency's ("CIA") decision to keep its use of Bishop, Baldwin, Rewald, Dillingham & Wong a secret. (Memorandum, p. 4, August 15, 1988, Appendix "A") The Court held that "the alleged decision by the CIA to use BBRD&W and to keep its use of the company secret are administrative decisions grounded in social and economic policy. Thus, the decisions are within the discretion of the CIA and protected."

The Ninth Circuit's opinion holds that the CIA's decision to use BBRD&W for its intelligence activities was a legal cause of Plaintiffs' harm, and thus is protected by the discretionary function exception. However, the Ninth Circuit's reasoning would immunize the Government for any tort. Any injury can be traced to a discretionary decision of a Governmental entity. Any injury committed by a public employee can be considered to be legally caused by the decision to hire that employee; clearly, a discretionary function.

Assuming arguendo, that the CIA's decision to use Bishop, Baldwin, Rewald, Dillingham & Wong, for its intelligence activities may have been a discretionary function protected by Title 28 U.S.C. § 2680(a), Plaintiff's action is not barred by that decision because the precise conduct at issue in this case, the supervision of employees and management of funds were not discretionary functions. If as the Ninth Circuit held, the Government is insulated from liability if a discretionary function is a legal cause of the harm, the Government could never be liable for negligence. The United States' liability under 28 U.S.C. § 2674 for injuries caused by careless drivers while acting within the scope of government is well established. *Hallberg v. Hilburn,* (5th Cir. 1970) 434 F.2d 90; *Platis v. United States,* (9th Cir. 1969) 409 F.2d 1009; *United States v. Johnson,* (9th Cir.

1950) 181 F.2d 577; *Murphy v. United States,* (9th Cir. 1950) 179 F.2d 743. Yet, by the Ninth Circuit's reasoning, a governmental employee who negligently operates a motor vehicle and injures a pedestrian while on official business, would be protected under the discretionary function exception, simply because the decision of the Government to use automobiles to carry out their official business is a discretionary function as well as a legal cause of the injury.

The Ninth Circuit's reliance upon *Georgia Casualty & Surety Co. v. United States,* (8th Cir. 1987) 823 F.2d 260 at 262 is misplaced. In *Georgia Casualty,* the FBI set up an undercover operation to break an automobile theft ring in Missouri. The FBI seized the automobiles from innocent purchasers and returned them to their original owners. The insurers of the innocent purchasers brought suit to recover their losses. In *Georgia Casualty,* the Plaintiff's Complaint "contended the FBI's decision to maintain complete secrecy in its undercover operation resulted in harm to innocent third parties for which the government should be liable" *supra,* at 262. However, as noted below, Petitioners' Complaint alleged that the CIA's connection with BBRD&W was not secret and in fact was used as an inducement for Plaintiffs to invest their funds in BBRD&W. Plaintiff's Complaint is instead based on Defendant's entirely separate duty to supervise employees and manage the funds of private citizens after the CIA received those funds. More importantly, in *Georgia Casualty,* the Court noted that the decision to seize the cars from innocent purchasers and return them to their original owners was itself a policy decision at 263.

Thus, like *Varig, supra,* the conduct alleged to constitute negligence was itself a policy decision. In the instant case, as noted above, Defendants have not cited a policy for the management of funds or the supervision of BBRD&W's employees. (Memorandum p. 6, August 15, 1988)

Even if Respondent were to allege and prove the existence of such a policy, they would also have to prove that they had no knowledge of facts from which they should have know that Petitioners' funds were in danger of being lost or stolen. Respondents would also have to prove that they didn't know that BBRD&W employees were using the Government's name as a cover for their illicit activities.

Moreover, the Ninth Circuit's ruling is incorrect as Petitioners' proposed Amended Complaint alleges that Petitioners knew BBRD&W was a CIA Operation.

Petitioners' proposed Amended Complaint and Appellant and Plaintiff's Reply Brief to the Ninth Circuit Court made clear:

> The Plaintiffs have not sued Defendants on Defendants decision to set up a domestic corporation for its activities. Instead, Plaintiffs sue on Defendants' separate duty to supervise employees and manage funds of private citizens held by the Central Intelligence Agency's front corporation. Plaintiffs do not allege and Defendants do not argue that the squandering of over 10 Million Dollars of investor funds was in furtherance of the Central Intelligence Agency's statutory Mandate to protect the security of the United States.

In fact, contrary to the Ninth Circuit's finding that the Petitioners' Complaint was based on the CIA's decision to secretly use BBRD&W for its intelligence activities, Petitioners' proposed Amended Complaint alleges that Respondents informed Petitioners of the CIA's connection with BBRD&W and the CIA's link to BBRD&W was an enticement to induce Petitioners' investments.

> The following oral representations, among others, were disseminated by employees, agents and "consultants" of BBRD&W:
>
> a. That principals in BBRD&W were connected with the Bishop and Dillingham families that had played important roles in the development of Hawaii;
>
> b. That BBRD&W was closely connected with, and did work for, agencies of the United States Government;
>
> c. That BBRD&W was an official operation of the United States CIA;
>
> d. That because of its Government connections, money invested with BBRD&W was guaranteed by the United States Government or the U.S. would make good any losses;
>
> e. That because of the work it performed for the United States Government, and/or its sponsorship by the CIA, BBRD&W had access to confidential intelligence information enabling it to make short term investments with extraordinarily high rates of return;

(Plaintiffs' Proposed Amended Complaint 5:3-20)

Thus, Plaintiffs' claims were not based on the CIA's secret use of BBRD&W. Plaintiffs' proposed Complaint is instead based on Defendants' negligent management of the investment funds after being entrusted with those funds.

Equally important, for the discretionary exception to apply, the conduct at issue must be within actor's statutory or regulatory authority. *Varig v. United States,* (1984) 467 U.S. 797. The Court's Memorandum overlooks the fact that the CIA is not

authorized to conduct operations within the United States. Title 50 U.S.C. § 403 *et seq*. The CIA's use of a Hawaiian corporation for its intelligence activities is outside of its authority and therefore cannot be protected by the discretionary function exception. *Varig v. United States*, (1984) 467 U.S. 797.

CONCLUSION

For the foregoing reasons, Petitioner's Petition For Writ Of Certiorari should be granted.

DATED: December 30, 1988

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